Editor's note: 93 I.D. 285; Errata issued -- See 370A below; Request for clarification granted; decision amended -- See 94 IBLA 215 (Nov. 5, 1986)

BLACKHAWK COAL CO. (ON RECONSIDERATION)

IBLA 85-732 Decided July 1, 1986

*365 Request for reconsideration of order dated February 25, 1986, and for supplemental order directing a refund.

Petition granted; refund ordered.

1. Accounts: Refunds--Federal Oil and Gas Royalty Management Act of 1982: Generally--Oil and Gas Leases: Royalties

   If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas [Sic] lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was 'not required * * * by applicable law' under 43 U.S.C. s 1734(c) (1982), and may be refunded under authority of that provision.

2. Appeals: Generally--Rules of Practice: Appeals: Dismissal

   An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief.

APPEARANCES: Hugh C. Garner, Esq., Salt Lake City, Utah, for appellant; Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On May 7, 1985, the Director, Minerals Management Service (MMS), denied a request by Blackhawk Coal Company (Blackhawk), that a demand letter for payment of royalty with respect to coal leases U-058184 and SL-029093-046653 be suspended pending appeal. Blackhawk had offered to post a bond in lieu of payment pending a final determination of the issues on appeal. By order dated February 25, 1986, this Board reversed the Director's decision, citing Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986). [FNa] That decision articulated the principles which govern the exercise of the Director's discretion under Departmental regulation 30 CFR 243.2, which authorizes him to suspend compliance with an order when an appeal is taken, and states that this may be done 'upon determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.' In Marathon, the Board concluded that the Director erroneously denied a stay under the above-quoted regulation because he made no reasoned finding that the stay would be detrimental to the lessor. Further, it was found that a stay should be granted where the lessee is faced with a threat of a irreparable injury if the stay is not granted, and where it appears that the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is

contrary to the public interest. In our February 25 order in Blackhawk's appeal, we found the record did not show that an indemnity bond would be inadequate to protect the public interest.

On March 13, 1986, Blackhawk requested this Board to issue an order entitling it to an immediate refund of the amount already paid, conditioned upon the posting of a bond in that amount. When appellant filed this request, further action seemed unnecessary, because no other action would be consistent with this Board's reversal of the Director's order. It had already been determined that the Director erroneously denied appellant's request for a suspension. From this ruling, it necessarily follows that the Director had erroneously collected appellant's money. His duty to refund that money became executory upon issuance of our order.

However, more than 1 month after the issuance of our order, MMS filed a request for reconsideration, and stated its opposition to appellant's request for a supplemental order. MMS states that Blackhawk's money has been deposited into the treasury as miscellaneous receipts and distributed to the State and the reclamation fund in accordance with 30 U.S.C. s 191 (1982). MMS correctly observes that once money is so deposited, an agency must have authority from Congress to withdraw it. MMS contends that no such authority exists. Because this new argument raises an issue as to the Director's authority to comply with our previous order, we find that reconsideration is warranted under 43 CFR 4.21(c) in order to consider this issue.

[1] MMS acknowledges that specific statutory authority governing the 'refund of disputed royalties deemed to be overpaid' is set forth at 43 U.S.C. s 1734(c) (1982), which provides as follows:

> In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

Contrary to MMS' argument, however, this provision undeniably authorizes MMS to refund Blackhawk's money. Our order dated February 25, 1986, constituted the Department's final determination that the Director's denial of a suspension was improper, and from this ruling, it follows that the collection of appellant's royalty was not properly required by any applicable law or Departmental regulation at that time.

MMS contends that no refund can be made until the Department finally determines whether appellant is liable for the disputed royalties. In making this contention, MMS confuses two discrete issues. The issue before us is not whether appellant is liable for the royalty; the issue is whether appellant was properly required to pay the disputed amount instead of posting a bond. We clearly ruled that this collection was improper. We therefore hold a refund is authorized by 43 U.S.C. s 1734(c) (1982).

[2] MMS seeks to distinguish Blackhawk's appeal from Marathon, arguing that Blackhawk has already paid the disputed amount while Marathon has not.

MMS contends that since appellant has paid the disputed royalties, the 'pay pending appeal' issue is moot. This argument miscomprehends the concept of mootness in the consideration of an appeal. An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief. For example, in Utah Wilderness Association, 91 IBLA 124 (1986), [FNb] the Board dismissed an appeal as moot because the drilling activity against which the appeal was directed had already taken place. Reversal of the decision under appeal would have provided no relief and any action by the Board would have been 'an exercise in futility.' Id. at 130. The circumstances of this case are quite opposite.

Next, MMS cites the hardship it would suffer in refunding appellant's royalties. Because the royalty has been deposited in the Treasury and distributed pursuant to 30 U.S.C. s 191 (1982), MMS contends that a refund would require recouping from the State of Utah its 50 percent share of these royalties. If MMS is required to take similar action in other cases where royalties have been paid under protest, 'many more millions of dollars' would have to be recouped from both Federal and State treasuries as well as from Indian tribes and allottees.

MMS' characterization of these difficulties cannot be taken at face value. MMS makes no effort to quantify the number of like refunds which would have to be granted, but the number of appeals to this Board has not been overwhelming. Unappealed decisions of the Director denying stays constitute final action on that issue, even though the action might be erroneous.

See 43 CFR 4.410. No refunds are required for unappealed cases. See Shaw Resources, Inc., 79 IBLA 153, 180, 91 I.D. 122, 137 (1984). [FNc] Furthermore, these foreseeable difficulties could have been easily avoided if MMS had made its determination consistent with 30 CFR 243.2. In weighing the harm to the lessee against that to the lessor as required by Marathon Oil Co., supra, we may properly discount the harm that MMS has caused itself through its failure to properly interpret or administer regulations it has promulgated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' petition for reconsideration is granted, our prior order sustained, and MMS is ordered to immediately refund $4,639,939.95, conditioned upon Blackhawk's posting a bond in such amount, pending resolution of all issues presently on appeal before the Director.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge

ERRATA

The decision reported at 92 IBLA 365, Blackhawk Coal Co. (On Reconsideration) decided July 1, 1986, is corrected at page 365 by deleting from headnote 1 the words 'Oil and Gas Leases' appearing in the topical heading of the note and by deleting the words 'an oil and gas' from line 3 of headnote 1 and substituting the words 'a mineral' for the deleted words.

Franklin D. Arness
Administrative Judge

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